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In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MISSOURI,
Petitioner,

vs.

ROBERT J. SETTLE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

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QUESTIONS PRESENTED

1. Whether contraband, seized in plain view by police after its abandonment by a defendant, is "tainted" by, or the "poisonous fruit" of, an unlawful arrest, and therefore rendered inadmissible in a criminal prosecution by the Fourth Amendment of the United States Constitution, where, prior to its abandonment, the police had stopped the defendant, but demonstrated no intent to arrest, search or even frisk the defendant?

2. Whether the Fourth Amendment requires the suppression of physical evidence obtained by police as a result of what otherwise would be a valid stop under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), because of the presence of "articulable suspicion" of criminal activity, but which is rendered invalid simply because the police are acting outside their territorial jurisdiction at the time of the stop, and not in "hot pursuit" of a fleeing felon?

3. Whether the Fourth Amendment requires the suppression of physical evidence obtained by police from a defendant who is initially stopped invalidly by police under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), solely because the officers are outside their territorial jurisdiction, if, prior to the acquisition of the evidence, the invalid stop ripens into a valid detention by the arrival of police from the jurisdiction where the stop occurred?

PARTIES

In the Missouri Court of Appeals, Western District, the parties were as follows:

State of Missouri, respondent, and Robert J. Settle, appellant, in case No. WD 34,189.

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PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

The petitioner, State of Missouri, respectfully requests that a writ of certiorari issue to review the judgment of the Missouri Court of Appeals, Western District, in the case styled *Robert J. Settle v. State of Missouri*, No. WD 34,189.

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, in the cause styled *Robert J. Settle v. State of Missouri*, No. WD 34,189, the case for which this Court's writ of certiorari is being sought, was filed on August 8, 1984, and has been reprinted in Appendix A-1. It recently has been published, and is now reported at *Settle v. State*, 679 S.W.2d 310 (Mo.App., W.D. 1984).

JURISDICTIONAL STATEMENT

In *Settle v. State*, No. WD 34,189, the opinion of the Missouri Court of Appeals, Western District, was filed on August 8, 1984. The opinion reversed the defendant's conviction for felony possession of a Schedule II narcotic drug, hydromorphone, in violation of § 195.020, RSMo 1978, on the ground that the vial containing this drug, which was abandoned by the respondent in the presence of several police officers, was the product of an unlawful arrest or "stop" and was therefore inadmissible under the Fourth Amendment of the United States Constitution. *Settle v. State*, 679 S.W.2d 310 (Mo.App., W.D. 1984).

The State's timely alternative motion for rehearing, or transfer to the Missouri Supreme Court, was overruled by the Court of Appeals on October 2, 1984. Thereafter, the State's timely application to transfer to the Missouri Supreme Court was denied by that court on November 20, 1984, at which time the judgment of the Court of Appeals became final. The order denying the application is reprinted in Appendix A-2 immediately following the opinion in this cause.

The present petition has been filed within 60 days after the final judgment in this case, and this Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution reads, in full, as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

Because of its length, § 84.710, RSMo 1978, which deals with the powers of arrest given to Kansas City, Missouri, police officers, and which is the only statute involved in this case, has been set forth in full in Appendix B following the Conclusion of this petition.

STATEMENT OF THE CASE

A. Procedural History

The respondent, Robert J. Settle, was found guilty on July 8, 1982, after a jury trial in the Circuit Court of Clay County, Missouri, 7th Judicial Circuit, of the unlawful possession of a narcotic drug, hydromorphone, in violation of § 195.020, RSMo 1978 (Tr. 396)[1], and, on Septem-

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1. References to the transcript of the respondent's trial have been preceded by the designation "Tr.".

ber 30, 1982, was sentenced by the Honorable John R. Hutcherson to a term of ten years imprisonment (Tr. 422).

On appeal to the Missouri Court of Appeals, Western District, the Court of Appeals reversed the respondent's conviction and ordered him discharged from custody on the theory that the vial of drugs, which had been discarded by the respondent in the presence of several police officers, was the product of an unlawful stop by a Kansas City, Missouri, police officer, who was in Gladstone, Missouri, and therefore outside his territorial jurisdiction, when the alleged stop had occurred. Although the respondent, who had not been arrested, searched or even frisked by police, abandoned the contraband by tossing it in some weeds, the Court of Appeals nevertheless held that the seizure of the evidence was the product of the police's alleged unlawful detention of the respondent. *Settle v. State*, 679 S.W.2d 310 (Mo.App., W.D. 1984).

The State's timely motion for rehearing or, in the alternative, transfer to the Missouri Supreme Court, was overruled on October 2, 1984, by the Court of Appeals, and the State's timely-filed application to transfer to the Missouri Supreme Court was overruled by that court on November 20, 1984. *See Settle v. State, supra,* 679 S.W.2d at 310; and petitioner's Appendix A-2.

B. Statement of Facts

From the evidence presented at trial, and prior to trial in connection with the respondent's motion to suppress, the jury or the trial court, sitting as the fact-finder during the pretrial hearing on the motion to suppress, could have reasonably found the following facts:

At 1:57 a.m. on the morning of May 22, 1981, Joseph McHale, a Kansas City, Missouri, police officer, while on

routine patrol, observed the respondent's vehicle pull into a Quik-Trip convenience store located in Kansas City, Missouri (Tr. 76). Officer McHale noticed that the respondent, a man in his mid-40's driving an automobile with Wyandotte County, Kansas, license plates, had appeared to accost two young women who were about to enter the store, followed them in his car when they left the store, and appeared to be driving erratically, as if he were intoxicated, as he continued to follow the two women in his car (Tr. 75-79, 131-132; L.F. 206, 306).[2]

The police officer testified emphatically at trial that the respondent's actions "aroused his suspicion for [the] safety" of the two women and that he "didn't know if he was going to harm them" or "if he had been bothering them" (Tr. 79). Officer McHale's suspicions increased when the respondent followed them into Gladstone in his car, especially when he noticed that the back right rear wheel of the respondent's vehicle left the pavement (Tr. 79), the respondent's car was weaving across the center line, and he appeared to be having difficulty "maintain[ing] complete control of his car in the line of traffic" (L.F. 206, 306; Tr. 131-132). When he saw the respondent's automobile leave the road, Officer McHale suspected that the respondent was intoxicated, and "follow[ing] [the women] for other than just legitimate reasons" (Tr. 79-80; L.F. 290), especially since the respondent had appeared to "avert them from going inside the store" (Tr. 79).

When the respondent's vehicle, which was continuing to follow the women in their car, passed into Gladstone, Missouri, Officer McHale requested that his dispatcher

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2. The designation "L.F." refers to the legal file that was filed with the Court of Appeals, and which contains, among other things, the depositions of the State's principal witnesses.

notify the Gladstone Police Department that he "had a possible intoxicated driver" and "to send me some assistance" (Tr. 80).

The two women pulled into the North Star apartment complex in Gladstone, and the respondent followed them (Tr. 80). Officer McHale, who was in uniform and driving an unmarked police car, "flipped" the spotlight on his vehicle to let the women and the respondent "know I was there" (Tr. 80). Both the respondent and the two women were outside their automobiles at this time; the officer "asked" the respondent and the two women for some identification (Tr. 80-82; L.F. 269-270). One of the women, testifying at the hearing on the motion to suppress, stated that one of the first questions the officer asked was if they were all right (Tr. 254, 260).

One or two minutes later, Officer Dan Coup arrived, followed by Officer Allen Toman, both of the Gladstone, Missouri, Police Department (Tr. 82; L.F. 259-260, 290). After apprising them of the situation (Tr. 82), Officer McHale sat in his car to await the results of a computer check on the respondent while Officer Coup stood next to the respondent alongside the respondent's car (Tr. 85; L.F. 291-292). The respondent, who had been holding a soft drink can, threw it and another item into an adjacent grassy area (Tr. 84-85, 96-97, 219; L.F. 292). Officer Coup asked Officer McHale to stand by the respondent and proceeded to the area where the respondent threw the can. There he retrieved the can and a plastic prescription bottle (Tr. 96-97, 219-220; L.F. 219). Inside the bottle, Officer Coup found 57 small yellow pills which were later determined to contain hydromorphone, a Schedule II drug (Tr. 280), one large white tablet, and three small plastic bags each containing white powder (Tr. 106, 109, 220-221).

The respondent was then arrested (Tr. 111). One of the Gladstone officers shined his flashlight into the respondent's car and saw a pistol on the floorboard and a paper sack on the seat (Tr. 111-112; L.F. 293). The bag was opened and found to contain three syringes, two bags containing the same white powder that was found in the prescription bottle, and a plastic bag containing 36 black capsules (Tr. 114-115; L.F. 294). One or more packets containing still more white powder was found in one of the respondent's pockets either as a result of a pat-down search conducted at this time (Tr. 121), or as a result of a subsequent stationhouse search (L.F. 296).

Testifying in his own behalf at trial, the respondent denied any ownership or knowledge of the vial of hydromorphone, and insisted that he had not discarded the drug in the weeds as the police officers testified, and denied having the drug in his possession (Tr. 345).

REASONS FOR GRANTING THE WRIT

I.

The Missouri Court of Appeals incorrectly concluded that the police's discovery of the vial of narcotics was the product or "poisonous fruit" of their prior, unlawful stop of the respondent, because the respondent's voluntary act of discarding the drugs in the presence of the officers broke any causal connection between the "stop" and the discovery of the drugs, particularly since the police made no attempt, prior to the respondent's abandonment of the drugs, to arrest, search or even frisk his person.

The respondent's conviction in this case was reversed by the Missouri Court of Appeals, Western District, on the

dubious theory that the vial of narcotics that the respondent was convicted of unlawfully possessing was the product or "poisonous fruit" of the police's unlawful "stop" of the respondent, even though the respondent attempted to discard the vial of drugs in the presence of the police by throwing it into some weeds, and even though the police, prior to the respondent's actions, made no effort to arrest, search or even frisk him.

The petitioner believes that the result reached by the Court of Appeals is not required by the Fourth Amendment and is inconsistent with this Court's holding in *Wong Sun v. United States,* 371 U.S. 471, 487-488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963), which emphasizes that not "all evidence is 'fruit of the poisonous tree' simply because it would not come to light but for the illegal actions of the police", and that the pertinent inquiry is whether the challenged evidence was acquired " 'by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' "

Essentially, the petitioner's argument is that where, as here, a defendant voluntarily discards contraband in the presence of police, even assuming that he has been unlawfully stopped prior to his act of abandonment, the seizure of the discarded contraband cannot accurately be considered the "fruit" of the illegal stop, at least where, as here, the police have given no indication that they intend to arrest, search or even frisk that person.

This Court recently discussed the "fruit of the poisonous tree" doctrine of *Wong Sun* in *Segura v. United States,* ..... U.S. ....., 104 S.Ct. 3380, 3385-3386[1-4], 82 L.Ed.2d 599 (1984), observing:

> [1, 2] The suppression or exclusionary rule is a judicially prescribed remedial measure and as "with

any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra,* 414 U.S. 338, 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561 (1974). Under this Court's holdings, the exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), but also evidence later discovered and found to be derivative of an illegality or "fruit of the poisonous tree." *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939). It "extends as well to the indirect as the direct products" of unconstitutional conduct. *Wong Sun v. United States,* 371 U.S. 471, 484, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963).

[3] Evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion. The question to be resolved when it is claimed that evidence subsequently obtained is "tainted" or is "fruit" of a prior illegality is whether the challenged evidence was

> " 'come at by exploitation of [the initial] illegality or instead by means *sufficiently distinguishable* to be purged of the primary taint.' " *Id.,* at 488, 83 S.Ct., at 417 (citation omitted; emphasis added).

[4] It has been well established for more than 60 years that evidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is "so attenuated as to dissipate the taint," *Nardone v. United States, supra,* 308 U.S., at 341, 60 S.Ct., at 268. . . .

The question squarely presented by this petition, then, is whether evidence seized by police that has been abandoned in their presence by an individual who has been unlawfully "stopped" for questioning, but not subject to a full-fledged arrest, must be suppressed as the "poisonous fruit" of that stop, or whether the individual's act in voluntarily abandoning the evidence, in effect, allows police to acquire that evidence " 'by means *sufficiently distinguishable* to be purged of the primary taint' ", rather than through "exploitation" of the prior illegality.[3]

State and federal courts have not been unanimous in their resolution of this issue. The closest case in point appears to be *State v. Oliver,* 368 So.2d 1331 (Fla.App. 1979), where a Florida appellate court expressly held that "a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person." *Id.*, 368 So.2d at 1335-1336[8]. "Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the police illegal search [citations omitted], and even that result may vary depending on the facts of the case. [Citations omitted.]" *Id.*, 368 So.2d at 1336[8]. The Florida court went on to state:

> "In the instant case, the defendant discarded property in the public streets after being illegally ordered to stop by the police. This otherwise voluntary abandonment of property in an area where the

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3. The State vigorously argued in the Missouri courts that Officer McHale's actions in "asking" the respondent for some identification did not amount to a "seizure" of his person within the meaning of the Fourth Amendment, because nothing in the State's evidence suggested that the respondent was "accost[ed]" by police or that his "freedom to walk away" was "restrain[ed]." See *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877[11], 20 L.Ed.2d 889 (1968). However, for purposes of the issues presented by this petition, it has been assumed that Officer McHale's actions amounted to a *Terry*-type stop.

> defendant had no reasonable expectation of privacy was in no sense prompted or tainted by the illegal police stop. Indeed, all agree that the police officers herein intended to stop and briefly question the defendant, rather than to arrest and search him. Moreover, the defendant no longer had any reasonable expectation of privacy in the property which he discarded because he divested himself of all possession therein by dropping it in a place where the public had complete access. This voluntary decision to avoid a police search by abandonment precludes him from now claiming that he was the victim of a search as to the property he discarded. . . ."

Id., 368 So.2d at 1336[9].

In the present case, as in *Oliver*, it is clear that the police did not intend to search or arrest the respondent, and the worst he could have expected (and, in fact, received) was a summons for a traffic offense (careless and imprudent driving). His voluntary abandonment of the drugs did not result from any police "exploitation" of his prior detention, *Wong Sun v. United States, supra,* 371 U.S. at 488, 83 S.Ct. at 417, but rather from his own voluntary actions.

Similarly, in *United States v. Colbert,* 474 F.2d 174 (5th Cir. 1973), the defendants were walking down a street, carrying briefcases, when they were stopped, questioned and frisked by two city police officers. As the officers approached the defendants, they set their briefcases on the sidewalk. They identified themselves as book salesmen, but when the officers asked to see the contents of the briefcases, the defendants replied that "they did not have to show the officers anything and denied that they owned the briefcases or had any knowledge about them." *Id.*, 474 F.2d at 175.

The officers stopped the defendants again, asked to see their draft cards, and when each denied possessing one, they arrested them for failure to carry a Selective Service registration certificate, a violation of federal law, and placed them in their patrol car. While in the patrol car, one of the defendants again denied knowing anything about the briefcases. One of the officers then returned to the briefcases, opened them, and found unregistered sawed-off shotguns inside, the offense for which both defendants were ultimately charged and convicted.

In concluding that the defendants had abandoned the briefcases prior to their search, the court stated:

> The facts of this case show conclusively that Colbert and Reese abandoned their briefcases before the searches took place. In response to police questions they both disclaimed any interest in the briefcases and began to walk away from them. The police officers in no way compelled these actions. Under these circumstances appellants could entertain no reasonable expectation of privacy in them. Compare Lurie v. Operhauser, [431 F.2d 330 (9th Cir. 1970)], where a disclaimer of any ownership or possessory interest in a suitcase in the course of a police investigation was held sufficient without more to support a finding of abandonment. The legal effect of the abandonment is, as noted above, to deprive appellants of standing to challenge the subsequent searches.

In *State v. Berry*, 609 S.W.2d 948, 952[9] n. 3 (Mo. banc 1980), the defendant attempted to challenge the seizure of a lighter he had abandoned while being chased by police. Although the court in *Berry* ultimately upheld the validity of the arrest, it also stated:

> If it were determined that defendant's arrest was illegal, the suppression sought by defendant was not

> available. During the chase by Officer Kelley, defendant tossed a cigarette lighter into the snow, where it was subsequently retrieved by the officer. Thus the lighter was not discovered through an "unreasonable search of the defendant." When, as here, a suspect abandons property, dropped during a chase, and it is found, he cannot claim an unconstitutional invasion of his rights. [Citations omitted.]

In the case below, the court declined to even cite, much less discuss or distinguish, either *Oliver* or *Colbert*, and although it cited *Berry*, it declined to follow it. *See Settle v. State*, 679 S.W.2d 310, 321 (Mo.App., W.D. 1984). Instead, the court chose to follow a line of federal cases which seemed to hold to the contrary, particularly *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979). In *Beck*, two city police officers approached the defendant and a passenger, who were sitting in a vehicle parked on the street. The officers pulled their patrol car alongside the defendant's vehicle, and engaged the defendant and his passenger in a conversation, inquiring why they were in the area. Noticing that they appeared "extremely nervous" and that they made what the officers interpreted to be "[f]urtive movements", the police decided to investigate further. The officers pulled their vehicle alongside the defendant's car, and noticed a cigarette on the ground. One of the officers then "directed Beck to get out of his car, obtained Beck's drivers license, and placed him in the rear of the patrol car." *United States v. Beck, supra,* 602 F.2d at 727.

The other officer returned and picked up the cigarette, which appeared to be (and, in fact, was) marijuana. He also noticed a small plastic bag on the ground beside the opened driver's door which contained a syringe and what again appeared to be marijuana. He picked up the bag,

looked into the Chevrolet, and observed in plain view another syringe located behind the driver's seat on the floorboard. He then placed the defendant's companion in the patrol car with Beck, and informed both men that they were under arrest for violating Alabama's controlled substances act. *Id.*, 602 F.2d at 727.

Beck concluded that the contraband discovered by police must be suppressed, because "it seem[ed] clear that the contraband was abandoned because of the illegal stop" and that, although the defendant and his companion abandoned the contraband, those "acts of abandonment d[id] not reflect the mere coincidental decision of Beck and his passenger to discard their narcotics" and that "it would be sheer fiction to presume they were caused by anything other than the illegal stop." *Id.*, 602 F.2d at 730. The court further stated:

> . . . Here, because there was "a 'nexus between . . . lawless [police] conduct and the discovery of the challenged evidence' which has not 'become so attenuated as to dissipate the taint,' . . . the evidence should be suppressed." *United States v. Maryland*, 479 F.2d at 568 (quoting *Fletcher v. Wainwright*, 399 F.2d 62, 64 (5th Cir. 1968). . . .

United States v. Beck, *id.*, 602 F.2d at 730.

In the first place, *Beck* and the cases it cites and relies on, such as *United States v. Maryland*, 479 F.2d 566 (5th Cir. 1973), can be distinguished from the present case, if only because they involve the alleged voluntary abandonment of property by a defendant who was, or who was about to be, subjected to a custodial arrest. In *Beck*, the defendant had been placed in the back seat of a patrol car, prior to the discovery of the contraband, and in *United States v. Maryland, supra*, where the court held

that true abandonment "cannot be brought about by unlawful police conduct", the contraband the government argued had been abandoned (counterfeit money) had been concealed by the defendant in a patrol car after he had been arrested and was being driven to a courthouse for questioning. *United States v. Maryland, supra,* 479 F.2d at 568.

In contrast to cases such as *Beck* and *United States v. Maryland, supra,* the respondent here was arrested only *after* he had attempted to dispose of the drugs; prior to that time, the police did not arrest, search or frisk the respondent or indicate to him that they planned to do so. Even the respondent's own testimony conceded that fact. *See Settle v. State, supra,* 679 S.W.2d at 315. Consequently, it cannot accurately be said that Officer McHale's actions in briefly stopping the respondent caused the respondent to abandon the drugs. Although it is reasonable to assume that "but for" the stop, the respondent would not have chosen to discard the drugs in the presence of the police, this Court has repeatedly emphasized, beginning with *Wong Sun,* that the appropriate yardstick to be applied in determining the admissibility of the evidence is not a "but for" test.

Consequently, while the State does not argue that the respondent's act of abandonment was a "mere coincidental decision" altogether unrelated to the action of police in "stopping" him and asking for identification, that is simply not the question. Rather, the issue is whether the drugs were acquired "'"by exploitation of [the initial] illegality or instead by means *sufficiently distinguishable* to be purged of the primary taint."'" *Segura v. United States, supra,* 104 S.Ct. at 3386.

In *United States v. Colbert, supra,* 474 F.2d at 180 (Brown, J., concurring), it was noted that this Court "has given little guidance as to the outer limits of [the abandonment] doctrine". This case, then, affords this Court an opportunity to clear up the considerable confusion that presently exists in this area, and to hold, consistent with *Wong Sun, Segura* and similar cases, that the Fourth Amendment does not require the seizure of evidence abandoned in the plain view of an arresting officer during an illegal "stop" of that individual, if the police have given no indication of any intent to arrest, search or frisk that person. Under such circumstances, there can be no "exploitation" of any illegality, and the individual's intentional, voluntary act of abandonment allows the State to acquire the evidence by a means "sufficiently distinguishable" to be purged of any taint stemming from the initial, illegal stop.

Accordingly, the decision of the Missouri Court of Appeals in this case was neither required nor justified under a correct interpretation of the Fourth Amendment, and this Court's writ of certiorari should issue to review this issue.

II

The Missouri Court of Appeals incorrectly concluded that the contraband abandoned by the respondent was required to be suppressed under the Fourth Amendment, because the officer who stopped the respondent had reasonable grounds, founded upon definite and articulable suspicion, to believe that the respondent posed a danger to the two young women he was following. If the "stop" was unlawful, it was only because the officer was outside his territorial jurisdiction, a statutory violation that did not infringe upon any of the respondent's constitutional rights.

Even if the Court of Appeals was correct in its conclusion that the respondent's abandonment of the drugs was "too direct and proximate to permit a finding of attenuation from illegality", *Settle v. State, supra,* 679 S.W.2d at 321, the court's subsequent holding that the Fourth Amendment required that the discovered contraband be excluded from evidence would still be incorrect, since the record reveals no infringement of any of the respondent's *constitutional* rights.

The facts of this case, as recounted by the State in its "Statement of the Case" and by the Court of Appeals in the course of his opinion, *Settle v. State, supra,* 679 S.W.2d at 313-316, clearly reveals that, if the stop had occurred in Kansas City, Officer McHale certainly would have been authorized by *Terry v. Ohio, supra,* to temporarily detain the respondent to determine if criminal activity was afoot. In *United States v. Place,* ..... U.S. ....., 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983), this Court again acknowledged that *Terry* and its progeny allow a police officer to make a forcible stop of a person "when the officer has a reasonable, articulable suspicion that the per-

son has been, is, or is about to be engaged in criminal activity." Certainly, in this case, "a reasonably prudent man in the circumstances [that confronted Officer McHale] would be warranted in the belief that [the] safety . . . of others was in danger." *Terry v. Ohio, supra*, 392 U.S. at 27, 88 S.Ct. at 1883.

Officer McHale's testimony at the pretrial suppression hearing and at trial illustrated that Officer McHale became justifiably concerned for the safety of two young women after he observed that the respondent, a man in his mid-40's driving an automobile with out-of-state license plates, had appeared to accost two young women who were about to enter a store at approximately two o'clock in the morning, followed them in his car when they left the store, and appeared to be driving erratically, as if he were intoxicated, as he continued to follow the two women in his car (Tr. 75-79, 131-132; L.F. 206, 306).

The officer testified that the respondent's actions "aroused his suspicion for their safety" and that he "didn't know if he was going to harm them" or "if he had been bothering them" (Tr. 79). Officer McHale's suspicions increased when the respondent followed them into Gladstone, especially when he noticed that the back right wheel of the respondent's vehicle left the pavement (Tr. 79), the respondent's car was weaving across the center line, and he appeared to be having difficulty "maintain[ing] complete control of his car in the line of traffic" (L.F. 206, 306; Tr. 131-132). When he saw the respondent's automobile leave the road, Officer McHale suspected that the respondent was intoxicated, and "follow[ing] [the women] for other than just legitimate reasons" (Tr. 79-80; L.F. 290), especially since the respondent earlier had appeared to "avert them from going inside the store" (Tr. 79).

Officer McHale radioed his dispatcher for assistance from the Gladstone Police Department (Tr. 80), but when both cars stopped, and the appellant appeared bent on following the women into their apartment, Officer McHale obviously had to take some action, since the Gladstone police had not yet arrived.

Consequently, if Officer McHale's *Terry*-type stop of the respondent was unlawful, it was solely because he was in Gladstone, and not Kansas City, and therefore outside his territorial jurisdiction. Unlike some states, Kansas City, Missouri, police officers do not have authority to arrest outside their territorial city limits, unless in "hot pursuit" of a fleeing felon. § 84.710, RSMo 1978. However, under the circumstances, Officer McHale obviously would have been derelict in his duty if he had simply turned around at the city limit sign, and disregarded the safety of the two women he sought to protect, simply because they were no longer within the territorial limits of Kansas City.

As even the Missouri Court of Appeals recognized, " 'violations of statutory provisions are not *per se* violations of constitutionally protected rights' ". *Settle v. State*, *supra*, 679 S.W.2d at 319. This brings this case, then, clearly within the purview of *People v. Hamilton*, 666 P.2d 152 (Colo. 1983). In *Hamilton*, officers from the town of Golden executed an arrest warrant for the defendant in Denver, outside their territorial authority. Since the warrant established probable cause for the defendant's arrest, the court in *Hamilton* concluded that, under the circumstances, the officers' conduct, while a violation of state statutory law, was not so unreasonable as to violate the constitutional protection against unreasonable searches and seizures. *Id.*, 666 P.2d at 156.

In attempting to distinguish *Hamilton*, the Missouri Supreme Court stated:

> . . . While this court recognizes that "violations of statutory provisions are not *per se* violations of constitutionally protected rights," *Hamilton*, 666 P.2d at 156 [citations omitted] (emphasis added), a different conclusion is reached under this set of circumstances. In *Hamilton*, the arrest warrant provided the probable cause to arrest the defendant. Unlike *Hamilton*, the officer here lacked any probable cause upon which to arrest the defendant. [citation omitted] Whether or not Officer McHale would have been authorized under *Terry v. Ohio* to briefly detain the appellant had a "stop" occurred before entering into Gladstone misses the point. The "articulable suspicion" justifying a *Terry* type stop cannot support an arrest by a private citizen, which must rest upon the commission of a felony [citation omitted], or breach of the peace [citation omitted], and reasonable grounds to believe the arrested person committed the offense. The state's argument would allow the broad statutory powers conferred upon Kansas City officers to apply outside their territorial jurisdiction. McHale's extraterritorial authority, absent hot pursuit, had been restricted, not enlarged.

Settle v. State, supra, 679 S.W.2d at 319-320.

The rationale of the Missouri Court of Appeals clearly misstates the State's argument, and therefore fails to respond to it. Obviously, McHale's action in stopping the respondent outside his territorial jurisdiction would have been proper under *Terry*, if he had been vested by statute with extraterritorial powers of arrest. Since he was not, his conduct might have resulted in a technical violation of

state law, but it violated none of the respondent's constitutional rights, and was no different from the police officers' action in *Hamilton,* where they had no authority to execute an arrest warrant outside their territorial jurisdiction.

Although the court in *Settle* states that Officer McHale "here lacked any probable cause upon which to arrest the defendant", the State has never suggested that there existed probable cause to *arrest,* but rather that Officer McHale did, in fact, have reasonable grounds, based on an articulable suspicion, to believe that the respondent might have been about to commit an assault upon the two women he was following, and therefore, there existed a basis under *Terry* to briefly detain the respondent.

The opinion by the Court of Appeals seems more concerned with the purported "illegality of McHale's 'police-like' actions", *Settle v. State, supra,* 679 S.W.2d at 321, than the well-being of the two young women he sought to protect, and chooses to disregard the obvious threat that the respondent appeared to pose to the safety of the two women. *Id.,* 679 S.W.2d at 319.

Quite simply, this case affords this Court the opportunity to expressly rule that where, as here, a police officer steps outside the bounds of his statutory authority to make a *Terry*-type stop, any evidence seized incident to that "stop" need not be suppressed if, as in the present case, there exist exigent circumstances justifying the police officer's action, and if the brief detention would have been valid (because of the presence of "articulable suspicion" of imminent criminal activity) if the officer's action had been taken within his own jurisdiction.

III.

The Missouri Court of Appeals incorrectly ruled that the Fourth Amendment required the suppression of the evidence abandoned by the respondent when he was stopped by police, because the respondent's action did not occur until the arrival of the Gladstone, Missouri, police. Accordingly, if Officer McHale's Terry-type stop of the appellant was invalid because he was outside his territorial jurisdiction (Kansas City, Missouri), the original illegality ended upon the arrival of the Gladstone police.

As noted under subsection II of this portion of the State's petition, if Officer McHale's *Terry*-type stop of the respondent was improper, it was only because he was outside his territorial jurisdiction (Kansas City) and within the city of Gladstone when this "stop" occurred.

However, as the opinion issued by the Court of Appeals clearly reflects, *State v. Settle, supra,* 679 S.W.2d at 320, it was not "until after the arrival of the Gladstone officers" that the appellant attempted to discard the vial of drugs. Consequently, it is clear that, since Officer McHale had reasonable grounds, based upon an "articulable suspicion", to believe that the respondent posed a threat to the safety of the two girls he was following at 2 a.m., any illegality that might have been inherent in his action in stopping the respondent in Gladstone dissipated with the arrival of the Gladstone officers.

Because, as the record clearly shows, Officer McHale would have been justified under *Terry* in stopping the respondent for questioning except for his lack of statutory authority to take such an action outside the city limits of Kansas City, this case falls squarely within the ambit of decisions such as *United States v. Walker,* 535 F.2d 896, 898

(5th Cir. 1976), and *United States v. Pimental,* 645 F.2d 85, 86 (1st Cir. 1981), which hold that evidence discovered in a search incident to what initially is an illegal arrest, but which becomes valid prior to the search as the result of intervening circumstances, need not be suppressed under the Fourth Amendment.

In *Walker,* the defendant had initially been arrested, apparently unlawfully, by an off-duty police officer acting as a bank security guard, and then was taken into custody by an on-duty police officer. The Court in *Walker* held that the focus of any inquiry into the probable cause for the defendant's arrest should have been on the second arrest, and that any evidence discovered was not obtained "through any exploitation of that initial arrest." *Id.,* 535 F.2d at 899. "To hold otherwise," the court in *Walker* said, "would be tantamount to adopting the 'but for' test that the Supreme Court eschewed in *Wong Sun.*" *Id.*

In *Pimental,* the defendant was initially stopped by police who had neither probable cause to arrest nor even an "articulable suspicion" that he had been or was involved in criminal activity. However, while still in police custody, the police obtained additional information amounting to probable cause. The Court in *Pimental,* noting that the defendant's initial detention, although unlawful, was merely "a good faith if mistaken exercise of otherwise legitimate police investigation", and that their actions were not " 'flagrantly illegal' " or a " 'deliberate misuse of arrest' ", held that the physical evidence sought to be suppressed by the defendant (a photograph of the defendant's car in the place where it was first observed) was not the product or "poisonous fruit" of the initial, unlawful arrest. *Id.,* 645 F.2d at 86-87.

The court noted that "[t]he car photo was the product of the illegal seizure in the sense that, *but for* the seizure of appellant, the picture probably would not have been taken as it was". The defendant, the court observed, "most certainly would have driven away before then." *Id.*, 645 F.2d at 86. However, the court cautioned, this Court made it clear in *Wong Sun* that a simple "but for" test was not the proper yardstick to be applied to such situations, but rather the question involved, among other things, " 'the purpose and flagrancy of the official misconduct' ". *Id.*, 645 F.2d at 86, citing *Brown v. Illinois*, 422 U.S. 590, 603-604, 95 S.Ct. 2254, 2261-2262, 45 L.Ed.2d 416 (1975).

In the present case, it can certainly be said that, "but for" Officer McHale's intervention, the Gladstone officers would not have been present to detain the respondent, and the contraband would not have been abandoned and recovered by police. However, as in *Pimental*, Officer McHale, although perhaps acting in excess of his jurisdiction, was certainly engaged in making "a good faith . . . exercise of otherwise legitimate police investigation". *Id.*, 645 F.2d at 86.

The Court of Appeals in *Settle* attempted to dismiss the import of *Walker* and *Pimental* by asserting that "no independent observation by the intervening officers amounting to probable cause had occurred" and that the Gladstone officers "merely acted as conduits for the continued detention of the defendant". *Settle v. State, supra*, 679 S.W.2d at 320.

This analysis, however, misses the point. In *Walker* and *Pimental* the initial detention of the defendants was invalid because of the absence of probable cause to arrest. Here, the respondent's detention was improper, because

Officer McHale was not statutorily authorized to make a *Terry*-type stop outside Kansas City. However, that impediment disappeared with the arrival of the two officers from Gladstone and at that point the illegal *Terry*-type stop ripened into a valid *Terry*-type detention. And when the respondent *then* attempted to dispose of the illegal drugs he had in his possession, the discovery and seizure of those drugs was, if anything, the product of the then-valid detention of the respondent, not Officer McHale's original stop of the respondent.

This, then, is still another, independent reason by the decision of the Missouri Court of Appeals should be reversed.

CONCLUSION

For the reasons advanced under the section of this petition entitled "Reasons for Granting the Writ", the State of Missouri respectfully submits that its petition for a writ of certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A-1

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

ROBERT J. SETTLE,	)	
Appellant,	)	WD 34189
v.	)	OPINION FILED:
STATE OF MISSOURI,	)	AUGUST 8, 1984
Respondent.	)	

Appeal From the Circuit Court of Clay County
Honorable John R. Hutcherson, Judge

Before Lowenstein, P.J., Manford and Berrey, JJ.

The defendant Robert Settle appeals a jury conviction for felony possession of a Schedule II narcotic, hydromorphone, in violation of § 195.200.1(1) RSMo. 1978. He received a sentence of seven years imprisonment. This opinion will first address the defendant's challenge to the admission into evidence, over his motion to suppress, of evidence claimed to be the fruit of an illegal stop and illegal search of the defendant's car.

Both parties rely upon the evidence adduced at the suppression hearing as well as that developed at trial. *See* State v. Lane, 613 S.W.2d 669, 674 (Mo. App. 1981). The focus lies primarily on the transcript of the hearing on the motion to suppress for the facts surrounding this issue, State v. Shelli, ... S.W.2d ..... (Mo. App. 1984)

(No. 45952 E.D. June 5, 1984), although all evidence bearing on the question may be considered on appeal. *See* State v. Hohensee, 473 S.W.2d 379, 380 (Mo. 1971).

On May 22, 1981 Sergeant Joseph McHale of the Kansas City, Missouri Police Department drove the night shift patrol in north Kansas City. He wore a uniform and carried a gun. He drove alone in an unmarked Plymouth police car having no emergency lights, sirens or markings identifying it as a Kansas City police car other than a spotlight on the driver's side.

Close to 2:00 a.m. McHale patroled through a Quik Trip parking lot, a convenience store that remained open at that hour, on Highway 169 and Englewood Road in Clay County. He spotted a vehicle with Missouri license plates occupied by two women who appeared to be in their twenties. Another car, with Wyandotte County, Kansas plates, also drove into the lot. From the vantage point of a bank parking lot, McHale saw the two women leave their car and walk over to talk to the driver of the second car, defendant Settle, who appeared to be in his forties. The age difference between the two women and Settle, as well as the second car's out-of-state license plate, caught the officer's attention.

McHale watched as the two women walked over to Settle's car and then "promptly turned back around, got in their car, and proceeded to leave" without going into the store. He considered their behavior "strange." On cross-examination, he stated there could have been laughter exchanged. McHale also did not think at this time that Settle was drunk nor did he see him drink anything.

The two women proceeded onto Broadway in their car, Settle followed, and McHale followed behind both of the two cars. After leaving the corporate limits of

Kansas City and after having entered into the city of Gladstone, McHale observed Settle's car "[leave] the roadway on the shoulder going off the road" at one point on the 5700 block of North Broadway. He stated Settle's rear wheel went onto the road's shoulder. He considered this "to be an indication that [the defendant] possibly was driving under the influence" and notified his Kansas City dispatcher to request assistance from the Gladstone police. He did not state what facts, if any, were related to the dispatcher. Officer Coup of the Gladstone Police Department testified he had been dispatched "to back a Kansas City police officer on a car check, traffic violation . . . ." McHale stated on cross-examination that the lack of any emergency equipment on his car prevented him from stopping Settle's car on Broadway.

McHale continued following the two cars into the North Star Apartments. McHale stated on cross-examination that the defendant had not committed any misdemeanor or felony, but believed a traffic violation in Gladstone had occurred. He had also checked Settle's license plate for wants or warrants before stopping. He stated he wished to talk to the defendant because he "felt him running off the road would give [him] probable cause to question him as to his sobriety . . . during that time of the morning." Although his testimony states, "The vehicle was finally stopped at 6321 North Wyandotte," the only inference drawn from the evidence was the defendant stopped the car on his own, with McHale following shortly afterwards. When McHale was asked who was at the scene when the vehicle was stopped, he responded, "I requested Gladstone and Gladstone responded." The only inference to be drawn from the testimony, however, was that some interval of time transpired between his arrival and the arrival of two Gladstone

officers, Coup and Toman. McHale did not testify on direct examination regarding what specific actions he took before the arrival of the Gladstone officers. He did state no arrest occurred, and refers to having taken identification from the two women, running a computer check on them, and allowing them to leave before the arrival of the Gladstone officers. He does not specifically refer to having taken identification from the defendant, although he refers to running a computer check using the defendant's identification upon the arrival of the Gladstone officers. On cross-examination, McHale stated he had walked up to the defendant and received identification from all three persons. He had told the two women "to come back to him."

McHale testified Officer Coup arrived in "just a matter of minutes . . . in . . . a minute, maybe two minutes afterwards. That's an estimation." Officer Toman arrived in a separate car after Officer Coup. At McHale's direction, Officer Coup stood watching Settle while McHale continued checking Settle's identification, although problems with the computer had arisen. McHale did not state on direct what facts, if any, he related to the Gladstone officers regarding his reasons for stopping Settle. On cross-examination, McHale stated, "I believe I told [the Gladstone officers] that [the defendant] had gone off the road" in Gladstone. Neither McHale or Coup related any observations of the defendant supporting McHale's suspicion that Settle had been drinking alcohol or was intoxicated.

Officer Coup continued to watch Settle, who stood carrying a can of pop in one hand. Coup then saw Settle reach into his pocket with his other hand and pull out some object he could not identify. Settle then threw the can of pop, along with the unidentified object, into a grassy

area. Coup asked the other two officers to watch Settle while he retrieved whatever had just been thrown by the defendant. Coup looked and less than a foot away from the can of pop, found a prescription vial containing small yellow tablets and small plastic bags containing a white powdery substance. Trial testimony identified two of the yellow tablets as hydromorphone.

The defendant was then placed under arrest, frisked, and his car opened and searched. A search of the car produced a handgun lying on the floorboard of the car, a brown sack containing additional white plastic bags of white powdery substances, some syringes, and some black pills. The plastic bags appeared similar to those found in the prescription vial. A search of the defendant's person produced another plastic bag holding a white powdery substance. Except for the gun, which was not allowed into evidence, all of the seized items were entered into evidence over the defendant's objections. Only the small yellow tablets in the prescription vial thrown by Settle were found to be controlled substances. The contents of the vial formed the basis of the charge for which Settle was convicted. At trial, the powdery substance was identified as "kiddie dope," a non-controlled substance.

At the Gladstone Police Headquarters, Officer Coup administered a breathalyzer test to the defendant after completing paperwork. The test came out as .01, well below the level considered as legally intoxicated. The officers issued a citation for careless and imprudent driving. Trial testimony indicated the citation was dismissed.

According to the defendant at the suppression hearing, on the evening in question Settle drove out to visit the women. One of the women, Brenda Langston, who testified on his behalf, had known Settle, through her husband,

for approximately two years. She and her friend agreed to meet Settle at the Quik Trip parking lot after Settle telephoned to say he could not find her apartment using her directions. Settle denied going off the road with his car. The defendant testified that the car driven by the two women pulled into the North Star Apartments, in Gladstone, on the left side of a driveway leading into a yard area of the apartment complex. Settle pulled his car behind the first, and walked toward the two women before remembering his car was unlocked. He walked back and locked his car, and had returned to the first car when Officer McHale's car then pulled in on the left side of the driveway, next to Settle's. The defendant testified that McHale "pulled up and put a light in my face and said do you have some identification. I said yes, sir, I do. He said I want it." He also requested identification from the two women. When Brenda told him she did not have identification on her person but could obtain it from her apartment, McHale refused to allow her to get the identification and instead asked for and received her name and birthdate. McHale then called into his dispatcher with the names. The defendant stated he did not attempt to walk away from the area because McHale "was a policeman. He had a gun." Other than requesting the identification, McHale did not command him to halt or to freeze. Nor was he advised that he was being charged with anything. The two women were allowed to leave after having been checked out on the computer. The defendant testified he asked McHale why he had been stopped, and McHale responded, "for drunk driving." When the defendant protested, McHale said, "[Y]eah, you shut up and I'll ask the questions." According to the defendant, after the women left, McHale asked Settle whether the two girls were prostitutes. He

replied McHale should have asked the girls that when they were there. McHale denied asking the question about the girls being prostitutes.

It was at approximately this point, according to Settle's testimony, when the two Gladstone police officers, Coup and Toman, arrived in two marked vehicles. McHale stated that Officer Coup stood by to watch the defendant while McHale ran a computer check from his car. The two women had already departed. Computer problems had arisen before the defendant's name could be run through.

Settle admitted throwing the can of pop but denied any knowledge or possession of the prescription vial containing hydromorphone. He claimed that the syringes and non-controlled drugs in his car were used as sedatives for his German Shepherd dogs.

Settle attacks the denial of his motion to suppress by arguing that Sergeant McHale lacked the authority to arrest or to conduct an investigatory stop outside his territorial jurisdiction of Kansas City, Missouri. He also argues that McHale lacked probable cause or any articulable suspicion to stop Settle, violating the Fourth Amendment's[1] proscription against unreasonable searches and seizures, as well as Article I, Section 15 of the Missouri Constitution.[2] All of the seized evidence, he argues, is the fruit of the illegal stop.

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1. U.S. Const. Amend. IV.

2. "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation" Mo. Const. Art. I § 15.

The parties' initial dispute concerns whether or not McHale actually "seized" the person of the appellant so as to raise any Fourth Amendment concerns. A seizure of a person occurs whenever an officer by physical force or through a show of authority imposes an involuntary restraint upon an individual's liberty. Terry v. Ohio, 392 U.S. 1, 19 (1968); United States v. Mendenhall, 446 U.S. 544 (1980). Deprivations of individual liberty falling short of a full-scale arrest still raise Fourth Amendment concerns. Not every street encounter between police officers and private citizens, however, results in an actual or constructive restraint of liberty. *See, e.g.*, State v. Conti, 573 S.W.2d 95, 98 (Mo. App. 1978); *United States v. Mendenhall, supra.* The test as posed by the United States Supreme Court is whether under all of the surrounding circumstances, a reasonable person would have believed he was not free to leave. *Mendenhall,* 446 U.S. at 554. "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification." *Mendenhall,* 446 U.S. at 554. The appellant here reasonably could have and did believe his option to walk away from McHale had been foreclosed. Detaining a person for the purpose of requiring identification has been held as a seizure. Brown v. Texas, 443 U.S. 47 (1979). Officer McHale wore a uniform and carried a gun. He shined a light in the appellant's face and positioned his car to restrict any exit path. Not only was Settle asked to produce identification, but was made to wait until a computer check ran through using his identification. When McHale permitted the two women to leave, but not the defendant, a reasonable and prudent person would interpret this to mean permission to leave must be

obtained. The officer's conduct objectively told Settle that compliance was compelled. *See also* United States v. Beck, 602 F.2d 726, 728-729 (5th Cir. 1979); Commonwealth v. Williams, 287 Pa. Super. 19, 429 A.2d 698, 702 (1981). Unlike *State v. Conti, supra,* the officer's conduct here can hardly be considered inoffensive or his questioning innocuous. Respondent argues that if any stop occurred, it was not until the Gladstone police officers arrived at the scene. The record compels a different conclusion. The Gladstone officers merely joined McHale, who had already succeeded in detaining Settle. At McHale's direction, Officer Coup watched the defendant; however, the defendant was no freer to leave before or after the arrival of the officers. His liberty had been restrained "as would under the Constitution require some particularized and objective justification." *Mendenhall,* 446 U.S. at 554.

The next issues surround the undisputed fact of McHale leaving his territorial jurisdiction of Kansas City to follow the defendant. The parties differ as to the effect of the Kansas City officer's lack of statutory authority in Gladstone and the applicable standard that would render the officer's extraterritorial stop or arrest of the defendant as unreasonable.

The statutory authority of Kansas City police officers extends only to the corporate boundaries and to municipal property located beyond city limits. Section 84.420 RSMo. 1978 and Cumm. Supp. 1983. Kansas City police officers are both municipal and state officers, and are empowered to arrest for both ordinance and state violations "within the city or on public property of the city beyond the corporate limits thereof . . . ." Section 84.710 RSMo. 1978 and Cumm. Supp. 1983. The status of "state officers" statutorily conferred upon Kansas City police officers subjects them to legislative control. *See* American Fire

Alarm Co. v. Board of Police Commissioners, 285 Mo. 581, 227 S.W. 114 (1920). The creation in large metropolitan cities of a system of police force "constitute[s] a part of the measures adopted by the state to preserve peace, and protect the legal rights of persons." *American Fire Alarm Co., supra,* at 116-117. Historically the statutory provisions circumscribing the duties and responsibilities of police have been interpreted as "[l]imiting the duty to arrest offenders as well as the power to do so . . . The express provision in the act defining the duties of the officers must be treated as excluding any authority to perform other functions not embraced in the act . . . ." State *ex rel.* McNamee v. Stobie, 194 Mo. 14, 92 S.W. 191, 201 (banc 1906). These statutes authorizing warrantless arrests, being in derogation of liberty, are to be strictly construed. Rodgers v. Schroeder, 220 Mo. App. 575, 287 S.W. 861, 868 (1926).

No argument can be made that McHale was in "hot pursuit" of Settle, since neither a chase nor the commission of a felony within McHale's territorial jurisdiction occurred. *See* State v. Keeny, 431 S.W.2d 95, 97 (Mo. 1968). The legislature, exercising its authority over its "state officers," has defined the duties and responsibilities of Kansas City officers within the territorial boundaries of the city. The statutes embrace no authority to arrest or stop persons outside the territorial jurisdiction of the city (excluding city property), and therefore, must be interpreted as excluding such authority. *McNamee, supra.* When McHale left the territorial boundaries of Kansas City, his status transformed into that of a private citizen. *See* State v. Fritz, 490 S.W.2d 30, 32 (Mo. 1973), *cert. denied,* 411 U.S. 985 (1973); State v. Goodman, 449 S.W.2d 656, 659 (Mo. 1970); State v. Gay, 629 S.W.2d 470, 473 (Mo. App. 1981).

"In Missouri, a private citizen may make an arrest on a showing of commission of a felony and reasonable grounds to suspect the arrested party." *State v. Fritz*, 490 S.W.2d at 32. *See also* Helming v. Adams, 509 S.W.2d 159, 166 (Mo. App. 1974). The common law also recognized this privilege of arrest to prevent an affray or breach of the peace.[3] *See, e.g.* State v. Parker, 378 S.W.2d 274 (Mo. App. 1964) (citizen's arrest of sheriff to prevent an affray held not to constitute an unlawful force, *i.e.* an assault upon the sheriff, since the common law allowed private citizens the privilege to arrest to prevent a breach of the peace). Statutory authorization for misdemeanor arrests (other than breaches of the peace) by private citizens has also existed. *See, e.g.*, Frank v. Wabash Railroad Co., 295 S.W.2d 16 (Mo. 1956) (involving the authority of private watchman to arrest for misdemeanors as a defense to a false arrest civil suit); Section 537.125 Cumm. Supp. 1983 (the merchant's privilege).

Although the respondent attempts to justify McHale's actions as a valid citizen's arrest, neither its evidence at trial or at the hearing, or its brief ever points to any misdemeanor offense that Settle was supposed to have violated. To the contrary, the radio dispatch to Gladstone mentioned only a traffic offense. McHale conceded on cross-examination no misdemeanor or felony had occurred, nor did he ever think one had occurred at the time he stopped Settle.

Respondent cites State v. Rue, 72 N.M. 212, 382 P.2d 697, 700 (1963); City of Troy v. Cummins, 107 Ohio App.

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3. "The Common Law further qualifies the authority of both the officer and the private citizen in misdemeanor arrests: the arrestee's conduct must constitute a breach of peace or present an apparent immediate threat thereof." Scurlock, Arrest in Missouri, 29 K.C.L.R. 115, 176-177 (1961).

318, 159 N.E.2d 239, 242 (1958); and State v. Jennings, 112 Ohio App. 455, 176 N.E.2d 304, 307 (1959) to support the argument that driving while intoxicated constitutes a "breach of the peace." None of these cases, however, recognize a private citizen's privilege of arrest for traffic offenses.[4] Nothing in the record supports the state's other argument that a "possible affray" between the two women and defendant was about to develop, justifying McHale's detention under *State v. Parker, supra.* No authority can be found granting private citizens the privilege to stop and detain persons believed to have committed ordinance violations or traffic offenses, and the wisdom of recognizing such a privilege is seriously doubted. Delegating to private citizens the authority to investigate and arrest for such offense would invite more breaches of the peace than the number hoped to be prevented. *See Graham v. State,* 143 Ga. 440, 85 S.E. 328 (1915).

The second ingredient necessary to the common law privilege of arrest by a private citizen, *i.e.* probable cause, is also missing in the present case. In *State v. Fritz, supra,* a federal treasury agent who had no local law enforcement jurisdiction assisted the Kansas City police department on local calls. After hearing a police call alerting officers to prowlers inside a residence, the agent sighted a man running across the front yard of a home on the same block. The defendant's arrest by the agent was not tainted by the agent's lack of authority since his actions did not exceed those of a private citizen. A felony

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4. In *State v. Rue, supra,* the court held that the jurisdiction of justices of the peace to hear cases involving breaches of the peace extends to offenses for driving while intoxicated. Both *City of Troy v. Cummins, supra* and *State v. Jennings, supra,* involved the issue whether operation of a motor vehicle fell within a statutory exception to privilege - from - arrest statutes. The courts both held that operating a motor vehicle fell within the exception for breaches of the peace.

had been committed and reasonable grounds existed to suspect the arrested person.

In *State v. Gay, supra,* a University City Police officer followed into St. Louis (outside his statutory jurisdiction), a car whose passengers matched the description of two men believed to have burglarized a store in University City. Citing to *Fritz,* the court in upholding the arrests relied upon the fact a felony had been committed and that reasonable grounds existed to suspect the arrested persons. Under those circumstances even private citizens could have arrested the defendants. 629 S.W.2d at 473. Likewise, in *State v. Goodman, supra,* the court did not consider the officer's status as private or public as determinative of the legality of the defendant's arrest for a recent felony outside the officer's jurisdiction, as long as reasonable grounds existed to believe the arrested persons committed the offense. 449 S.W.2d at 659. The court also stated an arrest cannot be used as a pretext to search for evidence. *Id.* In *Goodman,* the city marshall received a report of two strangers walking on a public highway outside of a small town late at night after a burglary had occurred within the town of Lathrop. In overturning the conviction, the court held no reasonable grounds existed to believe the two strangers had committed the offense.

> While an early morning perambulation along a public highway may not be a legal right usually exercised by the public in general, we are not wont to say that the mere discovery of a person so engaged, especially if he be otherwise unknown to the observer, constitutes probable cause or reasonably trustworthy information sufficient to warrant a prudent man in believing the pedestrian is guilty of having committed

> a felony. * * * "[T]he mere presence of an individual unknown to the police, in a suspicious place, can raise merely a suspicion that he has violated the law or committed a crime." (Citations omitted).

449 S.W.2d at 660.

In contrast to *Fritz, Gay,* and *Goodman,* Sergeant McHale did not have knowledge of the commission of any offense when he left the territorial jurisdiction of Kansas City. He left his jurisdiction armed with bare suspicions tied to age differences, an out-of-state license plate and behavior he considered "strange" but lacking the necessary ingredient of probable cause. One isolated instance of the rear wheel leaving the road during the course of several blocks does not rise to the level of probable cause that the driver was intoxicated, especially when McHale's prior firsthand observations failed to support such a suspicion. Neither did any observations of the defendant at the North Star Apartments indicate he was intoxicated. McHale's actions contradict the motives claimed to underlie his actions, affirming the conclusion that his suspicions served merely as a pretext to proceed on a nocturnal fishing expedition outside of his jurisdiction. *State v. Goodman, supra,* at 660. McHale also claimed to have legitimate concerns for the safety of the two women. His actions uncovered different concerns. He abandoned the opportunity at the Quik Trip to simply ask the women whether they were all right in favor of stalking the entire scenario. At the North Star Apartments, he demanded identification not only from the defendant but from the supposed potential victims, and asked whether they were prostitutes. Although his car was equipped with a spotlight, he made no attempt to stop the car claimed to be operating dangerously. When the car stopped at the apartments, he demanded identification not only from the driver of the car

believed to have committed the traffic offense, but also from the driver and passenger of the other car he followed.

Relying upon People v. Hamilton, 666 P.2d 152 (Colo. 1983) (banc), respondent argues that even if the defendant's arrest outside the territorial limit of McHale's authority resulted in a statutory violation, the exclusionary rule is not necessarily available as a remedy. In *Hamilton,* officers from the town of Golden executed an arrest warrant for the defendant in Denver, outside their territorial authority. The warrant established the probable cause for the defendant's arrest, 666 P.2d at 156, and the court concluded that under the circumstances the officers' conduct was not so unreasonable as to violate the protection against unreasonable searches and seizures. While this court recognizes that "violations of statutory provisions are not *per se* violations of constitutionally protected rights," *Hamilton,* 666 P.2d at 156 (citations omitted) (emphasis added), a different conclusion is reached under this set of circumstances. In *Hamilton,* the arrest warrant provided the probable cause to arrest the defendant. Unlike *Hamilton,* the officer here lacked any probable cause upon which to arrest the defendant. *See Goodman, supra,* at 659. Whether or not Officer McHale would have been authorized under *Terry v. Ohio* to briefly detain the appellant had a "stop" occurred before entering into Gladstone misses the point. The "articulable suspicion" justifying a *Terry* type stop cannot support an arrest by a private citizen, which must rest upon the commission of a felony, *Fritz, supra,* or breach of the peace, *Parker, supra,* and reasonable grounds to believe the arrested person committed the offense. The state's argument would allow the broad statutory powers conferred upon Kansas City officers to apply outside their territorial jurisdiction. McHale's extraterritorial authority, absent hot pursuit, had been restricted, not enlarged.

The state further argues that because the illegal contraband was undiscovered until after the arrival of the Gladstone officers, this court should conclude the discovery resulted from a second lawful stop, not the first. They argue any prior illegal stop by McHale should not taint the second lawful stop.

In Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), the Supreme Court decided that not all evidence will be considered as "the fruit of the poisonous tree" simply because "but for" the illegal actions of police officers the evidence would not have come to light. Assuming the primary illegality of the police conduct, the proper focus is whether the evidence has been discovered through an exploitation of the illegality or instead through means sufficiently distinguishable to be purged of any taint. 83 S.Ct. at 417.

Under the present circumstances, the continuation of the defendant's detention by the Gladstone officers did not purge the illegality of the detention by McHale. The discovery of the evidence resulted from an exploitation of an illegal detention unsupported by probable cause. Unlike United States v. Walker, 535 F.2d 896, 898 (5th Cir. 1976) and United States v. Pimental, 645 F.2d 85, 86 (1st Cir. 1981), both cited by the respondent, no independent observation by the intervening officers amounting to probable cause had occurred. The Gladstone officers merely acted as conduits for the continued detention of the defendant based upon a radio dispatch initiated by McHale. In *Walker,* the intervening officer had independently investigated the facts surrounding an alleged forgery prior to arresting the defendant. The court held the probable cause inquiry could properly focus upon the second arrest under those particular circumstances. The

court carefully distinguished the situation present here where arresting officers act in reliance upon another officer's knowledge without sufficient personal knowledge constituting probable cause. State v. Phillips, 140 Vt. 210, 436 A.2d 746, 750 (1981), also cited by the respondent, is distinguishable upon the same basis. Prior to the search involved in *Phillips*, a trooper had arrived at the scene where the defendant was being illegally detained, armed with facts amounting to probable cause. Because the same cannot be said of the Gladstone officers, their intervention did not "purge" the illegality of the defendant's initial detention by McHale. *See* Hardinge v. State, 500 S.W.2d 870 (Tex. Cr. App. 1973).

Inextricably tied to the facts and issue here is the question of whether an abandonment occurred when Settle threw the prescription vial. An abandonment brings the right of privacy to an end, removing any Fourth Amendment complaint about the seizure and introduction in evidence of the abandoned property. "In short the theory of abandonment is that no search is presented in such a situation, and the property so abandoned may be seized without probable cause." Mascolo, The Rule of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis, 20 Buff. L. Rev. 399, 400-01 (1971).

The issue common to the validity of the arrest and any theory of abandonment is that of the requirement of probable cause. An officer, without probable cause and acting strictly on a hunch or suspicion, who hounds an individual and harasses him into discarding contraband brings to the fore a constitutional question. The police by coercion (overbearing conduct without probable cause) cannot force an individual to abandon his right to privacy

and use the evidence against him. This would allow the police to do indirectly what could not be accomplished directly. *Mascolo, supra,* at 416-17; LaFave, Search and Seizure, Vol. 1, 373-74 (1978). Property thrown away due to the unlawful activities of police officers is not to be considered abandoned. State v. Reed, 284 So.2d 574, 575 (La. 1973). A warrantless arrest by a peace officer requires probable cause. State v. Berry, 609 S.W.2d 948, 952 (Mo. banc 1981). Probable cause must exist for a citizen's arrest. In *State v. Berry, supra,* an officer after discovering the defendant trespassing behind a bush, gave chase to the person who had acted "in a highly suspicious manner" and fit the description of a suspect in recent felonies. An article thrown by the defendant during the chase was not suppressed.

Here there was a uniformed policeman out of his jurisdiction acting like a policeman but having only the arrest powers of a private citizen. As stated earlier he had no probable cause that *any* crime had been committed. State v. Cuezze, 249 S.W.2d 373, 375 (Mo. 1952). The state has shown no felony or misdemeanor statute that existed for McHale to have probable cause to make a citizen's arrest. The illegality of McHale's "police-like" actions prompted the disposal and if allowed to stand would encourage illegal stops. *LaFave, supra,* (Cumm. Supp. 1984 n. 56 at 103). The link here between the "police activity" of McHale *i.e.,* dressed like a policeman, restraining the accused, asking for ID, running ID's through a computer from a radio in his car, or considering his activities merely as a private citizen, and the abandonment is too direct and proximate to permit a finding of attenuation from illegality. *Wong Sun v. United States, supra.*

Although involving police activity within their jurisdiction, the rationale in *United States v. Beck, supra,* applies to this case. There the police on routine patrol saw two men sitting in a car in a high crime area. The officers questioned the men and pulled their car closer to get out to question further. Contraband was then discarded. The court held the police had effectively restrained the defendant: he was not free to ignore the officer and in the totality of the circumstances had been stopped. Such a stop opined the court could only be lawful if based on reasonable suspicion. 602 F.2d at 729. Under the facts, the stop was illegal and the subsequent abandonment not voluntary but compelled by the illegal stop. *Id.* at 729. While a voluntary abandonment can remove the taint of an illegal stop or arrest, "it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct." *Id.* at 729-30. *See* U.S. v. Morin, 665 F.2d 765 (5th Cir. 1982).

In a letter filed after argument the state presented several theories to uphold the conviction. With citations of authority the state raised the abandonment theory and several others for the first time, not having mentioned or discussed them in respondent's brief. This prompted the appellant to counteract with a three page letter replete with authority. This is precisely what this court decried in State v. Taylor, 661 S.W.2d 794, 800 (Mo. App. 1983). Unfair and not to be tolerated is the state's presenting new arguments or theories after the filing of its respondent's brief. Supplementation of briefs is not the question, it is the presentation of new matters, such as the abandonment theory, after briefing, that is unfair to the appellant. New points, not specifically mentioned and covered in the brief, will not be considered after briefing by this court.

The Motion to Suppress the evidence for which the defendant was charged should have been sustained. The admission of the hydromorphone into evidence was prejudicial error. The defendant was charged with no other crime—this evidence cannot be used against him causing the judgment to be reversed and the defendant ordered discharged. Kansas City v. Butters, 507 S.W.2d 49, 55 (Mo. App. 1974).

All concur.

.....

Harold L. Lowenstein, Judge

APPENDIX A-2

No. 66488

IN THE SUPREME COURT OF MISSOURI
No. WD 34189

September Session, 1984

ROBERT J. SETTLE,
Appellant,

VS. TRANSFER

STATE OF MISSOURI,
Respondent.

Now at this day, on consideration of Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session thereof, 1984, and on the 20th day of November 1984, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 20th day of November, 1984.

/s/ Thomas F. Simon
Clerk

APPENDIX B

The complete text of § 84.710, RSMo 1978:

84.710. Police force—officers of state—powers to arrest (Kansas City).—1. The members of the police force appointed in pursuance hereof are hereby declared to be officers of the state of Missouri and of the city for which such commissioners are appointed.

2. They shall have power within the city or on public property of the city beyond the corporate limits thereof to arrest, on view, any person they see violating or whom they have reason to suspect of having violated any law of the state or ordinance of the city. They shall have power to arrest and hold, without warrant, for a period of time not exceeding twenty-four hours, persons found within the city or on public property of the city beyond the corporate limits thereof charged with having committed felonies in other states, and who are reported to be fugitives from justice. They shall also have the power to stop any person abroad whenever there is reasonable ground to suspect that he is committing, has committed or is about to commit a crime and demand of him his name, address, business abroad and whither he is going. When stopping or detaining a suspect, they may search him for a dangerous weapon whenever they have reasonable ground to believe they are in danger from the possession of such dangerous weapon by the suspect. No unreasonable force shall be used in detaining or arresting any person, but such force as may be necessary may be used when there is no other apparent means of making an arrest or preventing an escape and only after the peace officer

has made every reasonable effort to advise the person that he is the peace officer engaged in making arrest.

3. Any person who has been arrested without a warrant may be released, without being taken before a judge, by the officer in charge of the police station whenever the officer is satisfied that there is no ground for making complaint against him, or when the person was arrested for a misdemeanor and will sign a satisfactory agreement to appear in court at the time designated.

Office - Supreme Court, U
FILED
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ALEXANDER L. STEVAS
CLERK

(2)

No. 84-1193

In the Supreme Court of the United States

October Term, 1984

STATE OF MISSOURI,
Petitioner,
v.
ROBERT J. SETTLE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF FOR ROBERT J. SETTLE IN OPPOSITION

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QUESTION PRESENTED

Whether the action of the police officer in this case violated the Fourth Amendment's prohibition against unreasonable searches and seizures when the police officer detained Respondent outside the police officer's jurisdiction without reasonable suspicion or probable cause, with the result that evidence obtained by reason of the police officer's action should be suppressed.

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No. 84-1193

In the Supreme Court of the United States

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STATE OF MISSOURI,

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v.

ROBERT J. SETTLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

BRIEF FOR ROBERT J. SETTLE IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at *Settle v. State*, 679 S.W.2d 310 (Mo.App. W.D. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1984. The State's Motion for Rehearing or Transfer to the Missouri Supreme Court was overruled by the Court of Appeals on October 2, 1984. The Missouri Supreme Court denied the State's application to transfer to that court on November 20, 1984. The Petition for Writ of Certiorari was filed with this Court on January 18, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent was found guilty on July 8, 1982 after a jury trial in the Circuit Court of Clay County, Missouri of unlawful possession of hydromorphone in violation of Section 195.020, R.S.Mo. (1978) and on September 30, 1982 was sentenced by the Honorable John R. Hutcherson, Associate Circuit Judge, to a term of ten years imprisonment. (Tr. 396, 422). On appeal, the Missouri Court of Appeals, Western District, reversed Respondent's conviction and ordered him discharged from custody on the grounds of an unlawful detention of Respondent.

The facts are fully set forth in the Opinion of the Court of Appeals. (The trial court made no findings of fact.) The Court of Appeals found the following facts in the Court's opinion (Pet.App. 2-7) and same are set forth below.

On May 22, 1981, Sgt. Joseph McHale of the Kansas City, Missouri Police Department, wearing a uniform and carrying a gun, drove alone in an unmarked police car having no emergency lights, sirens or markings identifying it as a Kansas City police car other than a spotlight on the driver's side.

At about 2:00 a.m., McHale patroled through a Quik Trip parking lot, a convenience store that remained open at that hour, on Highway 169 at Englewood Road in Clay County, Missouri. He spotted a vehicle with Missouri license plates occupied by two women who appeared to be in their twenties. Another car, with Wyandotte County, Kansas plates, also drove into the lot. From the vantage point of a bank parking lot, McHale saw the two women leave their car and walk over to talk to the driver of the second car, defendant Settle, who appeared to be in

his forties. The age difference between the two women and Settle, as well as the second car's out-of-state license plate, caught the officer's attention.

McHale watched as the two women walked over to Settle's car and then "promptly turned back around, got in their car, and proceeded to leave" without going into the store. McHale stated there could have been laughter exchanged. McHale also did not think at this time that Settle appeared intoxicated. In actuality, Settle had driven out to visit the women, one of whom had known Settle through her husband for approximately two years. The two women had agreed to meet Settle at the Quik Trip after Settle phoned to say he could not find one of the women's apartment.

The two women proceeded to go to their destination (the North Star Apartments) in their car. Settle followed, and McHale followed behind both of the two cars. After leaving the corporate limits of Kansas City and after having entered into the City of Gladstone, Missouri, McHale observed Settle's car "(leave) the roadway on the shoulder going off the road" at one point on the 5700 block of North Broadway. He stated Settle's rear wheel went onto the road's shoulder. He considered this "to be an indication that (the defendant) possibly was driving under the influence" and notified his Kansas City dispatcher to request assistance from the Gladstone police. He did not state what facts, if any, were related to the dispatcher. Officer Coup of the Gladstone Police Department testified he had been dispatched "to back a Kansas City police officer on a car check, traffic violation. . . ." McHale stated that the lack of any emergency equipment on his car prevented him from stopping Settle's car on Broadway.

McHale continued following the two cars into the North Star Apartments. McHale stated that the defendant had

not committed any misdemeanor or felony, but believed a traffic violation in Gladstone had occurred. He had also checked Settle's license plate for "wants or warrants" before stopping. He stated he wished to talk to the defendant because he "felt him running off the road would give (him) probable cause to question him as to his sobriety . . . during that time of the morning". The defendant stopped his car on his own, with McHale following shortly afterwards. When McHale saw Settle outside of his car, McHale pulled up to defendant's car, showed a light in his face, and asked for identification. Some interval of time transpired between McHale's arrival and the arrival of two Gladstone officers, Coup and Toman. McHale took identification from the two women and defendant, running a computer check on them, and allowing the women to leave before the arrival of the Gladstone officers. McHale walked up to the defendant and received identification from all three persons. He had told the two women "to come back to him". One of the women did not have identification and McHale refused to allow her to obtain identification from her apartment and instead asked for and received her name and birth date. Defendant did not leave because McHale was a policeman and had a gun. McHale told Settle he was being arrested for drunk driving. When Defendant protested, McHale told him to "shut up and I'll ask the questions". The women were allowed to leave after they were checked out in the computer. After they left, McHale asked defendant whether they were prostitutes.

McHale testified Officer Coup arrived in "just a matter of minutes . . . in . . . a minute, maybe two minutes afterwards. That's an estimation." Officer Toman arrived in a separate car after Officer Coup. At McHale's direction, Officer Coup stood watching Settle while McHale

continued checking Settle's identification, although problems with the computer had arisen. As to the facts related by McHale to the Gladstone officers regarding his reasons for stopping Settle, McHale stated, "I believe I told (the Gladstone officers) that (the defendant) had gone off the road" in Gladstone. Neither McHale nor Coup related any observations of the defendant supporting McHale's suspicion that Settle had been drinking alcohol or was intoxicated.

Officer Coup continued to watch Settle, who stood carrying a can of pop in one hand. Coup then saw Settle reach into his pocket with his other hand and pull out some object he could not identify. Settle then threw the can of pop, along with the unidentified object, into a grassy area. Coup asked the other two officers to watch Settle while he retrieved whatever had just been thrown by the defendant. Coup looked and less than a foot away from the can of pop, found a prescription vial containing small yellow tablets and small plastic bags containing a white powdery substance. Trial testimony identified two of the yellow tablets as hydromorphone.

The defendant was then placed under arrest, frisked, and his car opened and searched. A search of the car produced a handgun lying on the floorboard of the car, a brown sack containing additional white plastic bags of white powdery substances, some syringes, and some black pills. The plastic bags appeared similar to those found in the prescription vial. A search of the defendant's person produced another plastic bag holding a white powdery substance. Except for the gun, which was not allowed into evidence, all of the seized items were entered into evidence over the defendant's objections. Only the small yellow tablets in the prescription vial thrown by Settle were found to be controlled substances. The con-

tents of the vial formed the basis of the charge for which Settle was convicted. At trial, the powdery substance was identified as "kiddie dope", a non-controlled substance.

At the Gladstone Police Headquarters, Officer Coup administered a breathalyzer test to the defendant after completing paperwork. The test came out as .01, well below the level considered as legally intoxicated. The officers issued a citation for careless and imprudent driving. Trial testimony indicated the citation was dismissed.

The appellate court found that: ". . . Sgt. McHale did not have knowledge of the commission of any offense when he left the territorial jurisdiction of Kansas City. He left his jurisdiction armed with bare suspicions tied to age differences, an out-of-state license plate and behavior he considered 'strange' but lacking the necessary ingredient of probable cause. One isolated instance of the rear wheel leaving the road during the course of several blocks does not rise to the level of probable cause that the driver was intoxicated, especially when McHale's prior firsthand observations failed to support such a suspicion. Neither did any observations of the defendant at the North Star Apartments indicate he was intoxicated. McHale's actions contradict the motives claimed to underlie his actions, affirming the conclusion that his suspicions served merely as a pretext to proceed on a nocturnal fishing expedition outside of his jurisdiction. McHale also claimed to have legitimate concerns for the safety of the two women. His actions uncovered different concerns. He abandoned the opportunity at the Quik Trip to simply ask the women whether they were all right in favor of stalking the entire scenario. At the North Star Apartments, he demanded identification not only from the defendant but from the supposed potential victims, and asked whether they were prostitutes. Although his

car was equipped with a spotlight, he made no attempt to stop the car claimed to be operating dangerously. When the car stopped at the apartments, he demanded identification not only from the driver of the car believed to have committed the traffic offense, but also from the driver and passenger of the other car he followed. . . ." (Pet.App. A14-A15).

McHale's credibility was for the Court of Appeals to determine. At one point in the proceedings, McHale testified he saw *both* of the back wheels of Settle's car go off the road. (Tr. 79). His trial testimony was inconsistent with his other testimony. (LF 107-109). He also stated he kept Settle detained but let the two women leave so that the Gladstone Officer could arrest Defendant. (Tr. 82). Both Kansas City (Section 34.115) and Gladstone (Section 300.366) Ordinances provide that a person is guilty of careless driving only if he endangers the property or person of another. *State v. Todd,* 477 S.W.2d 725 (Mo.App. 1972). There were no such circumstances here. These ordinances are set out in the Appendix at A1.

ARGUMENT

1. Petitioner asks this Court to review the fact finding of the Missouri Court of Appeals, Western District. This Court should not grant certiorari to review any purported errors in fact finding by state courts. *Grayson v. Harris*, 267 U.S. 352, 358 (1925); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *United States v. Sharpe*, 469 U.S. ....., 36 C.R.L. 3197, 3206-3207 (Brennan, dissenting) (1985). Indeed, this Court customarily accepts the factual findings of state courts in the absence of exceptional cir-

cumstances. *California Retail Liquor Dealers Ass'n v. Midcal Alum.*, 445 U.S. 97, 111-112 (1980).

2. The petition for certiorari should also be denied because of the failure by Petitioner to comply with this Court's rules. Thus, the petition for certiorari does not indicate the reasons to be considered in this Court's granting review on certiorari under Rule 17 of this Court's rules. Thus, it is not stated in the petition that the state court in this instance decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals, nor is it stated that the state court in this instance decided an important question of federal law which has not been, but should be, settled by this Court; nor finally is it stated that the state court in this instance decided a federal question in a way in conflict with applicable decisions of this Court.

3. This Court should deny review as to Questions 1 and 3 presented in the Petition for Certiorari because the issues presented as to these questions were not presented to the appellate court until oral argument and after oral argument. (See, Pet.App. A19; see Letter to Court of Appeals from Petitioner dated July 3, 1984, at App. A2-A4). Petitioner's Brief in the Court of Appeals failed to raise the issue of "abandonment"; the issue that the hydromorphone was seized by the Gladstone police as a result of a second, lawful stop by the Gladstone police was also not raised in Petitioner's Brief in the Court of Appeals—the argument was made in the brief *only* that this second stop justified the search of the passenger compartment of Settle's car. (State's Brief at 41-42). Petitioner did urge the appellate court that "stop" did not occur until after the Gladstone police arrived. (State's Brief at 37). Petitioner has abandoned this latter con-

tention in this Court. It is essential to the jurisdiction of this Court under 28 U.S.C. Section 1257 that a substantial federal question has been properly raised in the state court proceedings. See generally Stern and Gressman, "Supreme Court Practice", 5th Ed., at p. 208; compare, *Illinois v. Gates,* 103 S.Ct. 2317, 2321-2325 (1983).

4. Petitioner contends that in its first reason for this Court to grant the writ that there was no "causal connection" between the unlawful stop and the discovery of the drugs. The Court of Appeals' opinion, upon which defendant relies, found directly to the contrary. (Pet.App. A17-A19). The facts in the *Oliver, Colbert,* and *Berry* cases cited by Petitioner are factually dissimilar from the instant case. None of these cases involved a "pre-textual" stop or arrest as does the instant case. In any event, the *Oliver* opinion has been criticized by a leading authority and has not been followed in a subsequent case in Florida:

> "The *Oliver* reasoning is not convincing. The question is not whether, but for the throwing away of the objects, the police would have found them in an illegal search. Rather, the question is whether the prior illegality has prompted the disposal, which it most assuredly did. *Oliver* is an invitation to police to engage in illegal stops. The better view, therefore, is reflected in *Monanhan v. State,* 390 So.2d 756 (Fla.App. 1980) (Abandonment argument rejected, as abandonment came after illegal stop of defendant)." 1 *LaFave,* "Search and Seizure", Pocket Part at p. 146.

Unlike *Oliver,* the facts in this case show that the search began of defendant before any "abandonment" of any controlled substance. *State v. Berry* is also inapposite on its facts as there was an abandonment of a cigarette lighter in the snow during a chase by an officer. The court's holding

in *Berry* was *dicta;* the court in fact held that there was probable cause for a warrantless arrest. The Court of Appeals distinguished *Berry* and the Missouri Supreme Court declined review of the appellate court's opinion in this case. In any event, this Court should not grant certiorari to resolve a conflict between the Missouri Supreme Court and one of Missouri's appellate courts. *Compare, Davis v. United States,* 417 U.S. 333, 340 (1974) (Certiorari not granted to resolve intra circuit conflicts).

The law seems generally settled in support of Defendant's position on this issue. *United States v. Beck,* 602 F.2d 726 (5th Cir. 1979) cited by the Court of Appeals; *Commonwealth v. Jeffries,* 311 A.2d 914 (1973); *Commonwealth v. Harris,* 421 A.2d 199 (1980); *Commonwealth v. Barnett,* 398 A.2d 1019 (1979); *State v. Bennett,* 430 A.2d 424 (R.I. 1981). There is a discussion of the cases in *LaFave, Id.,* at pp. 366-375. There is no reason to grant the writ for this reason under Rule 17 as no true conflict with existing case authority appears.

5. In Question 2, the Petitioner argues that there was, in fact, reasonable grounds for a stop of Settle. Petitioner then urges the somewhat novel position that although a right to stop may have been granted to a police officer under this Court's decision in *Terry v. Ohio,* 392 U.S. 1 (1968), it should also be extended to an officer who did not have the power to act as a police officer because he had exceeded his jurisdiction.

Defendant believes that the question as posed is improperly stated. In the first instance, it appears that the Court of Appeals held that there was, in fact, an arrest as opposed to a "stopping" of defendant by Officer McHale. Thus, McHale would have had to have "probable cause" in order to effectuate the detention of defendant on the night

in question. The Court of Appeals held that McHale did not have such grounds, but was merely using the detention as a pretext to search for evidence. This is in violation of established precedent. *United States v. Lefkowitz,* 285 U.S. 452 (1932). Even if McHale's action was in a "stop", nothing can be seized as being in "plain view" if such objects were seen following a pre-textual *stop* for a minor offense. *United States v. Santana,* 485 F.2d 365, 367-68 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974). There is in fact a lengthy discussion in the Court of Appeals' opinion, upon which defendant relies, concerning whether or not there were grounds for a "citizen's arrest" but the Court of Appeals found that there were no such grounds under Missouri law or otherwise. Thus, it is clear that the Court of Appeals' opinion is not based solely upon the fact that the officer exceeded his jurisdiction but rather on the fact that there was neither reasonable suspicion, nor probable cause for the action (whether an arrest or a stop) that the officer took in this case.

Question 2 presents no ground for this Court's review under Rule 17.

6. With respect to Question 3 presented by Petitioner's petition, again, the state assumes that McHale had reasonable grounds based upon articulable suspicion to detain defendant. The Court of Appeals found otherwise.

The cases cited by the state in this regard are distinguishable from the instant case and do not present a conflict question by this Court. *United States v. Walker,* 535 F.2d 896 (5th Cir. 1976), cited by the state, is inapposite. The court appealed the seizure in that case because the only nexus between the first arrest and the second was the fact of defendant's arrest at the scene. The second arrest was based entirely upon another police of-

ficer's independent investigation of the facts, which was not the case here. It is also noted that *United States v. Walker* has been criticized as a "questionable result, for it would seem to encourage the seizure of suspects upon inadequate grounds while an investigation is conducted for the purpose of establishing probable cause". 3 *LaFave*, "Search and Seizure", at p. 643.

United States v. Pimental, 645 F.2d 85, 86 (5th Cir. 1981), also cited by the state, is also inapposite because in that case in the interim period after an arrest, the police developed from other sources reasonable suspicion that the car was involved in criminal activity.

Question 3 presents no ground for this Court's review under Rule 17.

In *Whitely v. Warden*, 401 U.S. 560 (1971), the court held that if the instigating officer in arrest did not possess sufficient evidence to constitute reasonable grounds to make an arrest, the arrest was invalid.*

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*This case does not present the issues present either in this Court's decision in *United States v. Sharpe*, 469 U.S. ....., 36 C.R.L. 3197 (1985), holding that a 20-minute *Terry* stop was not a *per se* violation of the Fourth Amendment, where the officers, unlike the instant case, met *Terry* standards, or in the court's opinion in *United States v. Hensley*, 469 U.S. ....., 105 S.Ct. 675 (1985). In *Hensley*, the court held that a "wanted" flyer issued upon facts giving rise to a reasonable suspicion under *Terry* gave other officers a right to stop defendant. Here there were no such facts giving rise to a reasonable suspicion conveyed by McHale to the Gladstone officers. As was said by this Court in *Hensley*: "If the flyer has been issued in the absence of a reasonable suspicion, then a stop in objective reliance upon it violates the Fourth Amendment." 105 S.Ct. at 683.

CONCLUSION

It is therefore respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April, 1985

APPENDIX

Kansas City Ordinance 34.115 reads as follows:

> "No person shall drive any vehicle within this city carelessly and heedlessly in disregard of the rights or safety of others; or without due caution and circumspection; or at a speed and in a manner so as to endanger or to be likely to endanger any person or property."

Gladstone Ordinance 300.366 reads as follows:

> *"Section 300.366. Careless driving.*
>
> "Any person who drives any vehicle upon a street carelessly and heedlessly, in disregard of the rights or safety of others, or without due caution and circumspection, or at a speed and in a manner so as to endanger or to be likely to endanger any person or property shall be guilty of careless driving and shall be in violation of this ordinance."

(State Seal)

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July 3, 1984

Ms. Peggy J. Stevens, Clerk
Missouri Court of Appeals,
Western District
1300 Oak Street
Kansas City, MO 64106

Re: State v. Robert J. Settle, No. WD 34,189

(Cir.Ct. No. CR181-207F)

Dear Ms. Stevens:

The above-styled case has been fully briefed and was orally argued on Monday, June 25, 1984, before Division III (Judges Lowenstein, Manford and Berrey). During oral argument, counsel for the respondent referred to several cases and authorities that were not listed in the briefs filed by the parties in this action. These cases and authorities all deal with the appellant's final argument, and therefore should be added to the citations listed under Point III of the State's brief.

Two of the cases have been cited in support of the State's argument that the appellant abandoned the con-

trolled substance by discarding it in a field, thereby rendering the legality of the alleged arrest or "stop" irrelevant:

State v. Oliver, 368 So.2d 1331 (Fla.App. 1979);

State v. Berry, 609 S.W.2d 948, 952[6-7] n. 3 (Mo. banc 1981).

The remaining cases have been cited in support of the appellant's argument that even if the Kansas City police did, in fact, arrest or unlawfully "stop" the appellant, the discovery of the contraband was the result or "fruit" of a second, lawful stop by the Gladstone police that was not tainted by the alleged prior illegal stop:

United States v. Pimental, 645 F.2d 85, 86-87[1] (1st Cir. 1981);

United States v. Walker, 535 F.2d 986, 898-899[1-2] (5th Cir. 1976);

State v. Jacobson, 398 So.2d 857, 858-859[1-2] (Fla.App. 1981);

State v. Phillips, 140 Vt. 210, 436 A.2d 746, 750-751[13-14] (1981).

Finally, in support of the State's argument concerning the validity of the alleged "stop" as a citizen's arrest, the respondent wishes to add the following authority that had not been published at the time the State's brief was prepared:

Scurlock, *Basic Principles of Arrest, Searches and Seizures, Privilege Against Self-Incrimination,* 51 U.M.K.C. L.Rev., Vol. 51, Nos. 3-4, p. 418 (Spring-Summer 1983).

At page 418 of that article, Professor Scurlock notes that "[i]n Missouri, a private person apparently may arrest for any misdemeanor commited in his presence".

Fifteen copies of this letter have been enclosed with the original, so that one might be attached to, or inserted in the copies of the State's brief previously filed with this Court. As always, we appreciate your consideration and cooperation in this matter.

Very truly yours,

JOHN ASHCROFT
Attorney General
/s/ Philip M. Koppe
PHILIP M. KOPPE
Assistant Attorney General

PMK:pk
Encl.
cc: Mr. James R. Wyrsch